

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:

Implementation of the Local
Competition Provisions in the
Telecommunications Act of 1996

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CC Docket No. 96-98

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REPLY COMMENTS

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Attachment 1	GTE's Proposed Guidelines to Implement Sections 251(b) and 251(c)
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Attachment 3	Affidavit of Michael J. Doane, J. Gregory Sidak, and Daniel F. Spulber

SUMMARY

The Telecommunications Act of 1996 did not declare open season on ILECs. Contrary to the arguments of AT&T, MCI, and certain CLECs, Congress did not:

- deny ILECs the opportunity to recover joint and common costs in pricing interconnection and unbundled network elements, while requiring them to exclude a portion of such costs in pricing services for resale;
- encourage IXCs to avoid access charges, while forcing ILECs to recover lost support flows by raising rates to consumers in order to create a pricing umbrella for pseudo-competition;
- compel ILECs to disclose sensitive cost information in interconnection negotiations, while prohibiting them from employing non-disclosure agreements;
- obligate ILECs to create services or upgrade and install technology and systems for competitors, while precluding recovery of associated costs;
- permit CLECs to re-combine unbundled network elements in order to avoid paying wholesale rates for resold ILEC services that provide contribution, while obtaining a mandatory resale discount on ILEC services that are priced below cost; or
- instruct ILECs to disaggregate their networks into dozens of components, while ignoring the serious technical and operational consequences.

Many of the positions advanced by these parties -- detailed national rules that constrain negotiations; artificial retail/wholesale margins sufficient to guarantee profitable resale; and sanctioned end-runs around access charges, among others -- were expressly rejected during the legislative process and cannot be adopted here. Others, such as substituting unbundled elements for resale, denying ILECs an opportunity to recover their costs, and requiring extreme unbundling for its own sake, are patently anticompetitive, imprudent, and/or unconstitutional.

The "new entrants" have lost sight of several key facts. First, the 1996 Act is intended to be "*deregulatory*." The parties proposing dozens of new rules covering every imaginable aspect of local competition mention the "D" word only in connection with their own operations. Second, the new statute encourages diversity over uniformity, by giving private parties the power to develop mutually beneficial interconnection arrangements without regard to the statutory requirements. The parties advocating detailed national prescriptions fail to articulate any factual or legal basis for overriding Congress's

preference. Third, the 1996 Act includes a mandatory arbitration right and other provisions that negate any undue bargaining power the ILECs might otherwise have. In reality, it is the parties most loudly proclaiming that rules are needed to avoid dilatory and unproductive negotiations (AT&T, MCI, and other IXC's) which possess the greatest incentive to negotiate in bad faith.

As GTE explained in its opening comments, the Commission can best achieve the 1996 Act's objectives -- and avoid creating serious legal questions that will only delay competition -- by identifying ranges of outcomes that are acceptable but not necessary to discharge the section 251 and 252 obligations. Notably, support for this approach comes from a wide range of parties, including leading state PUCs and CLECs as well as other ILECs. The Commission should heed the considered recommendations of these parties to enunciate "preferred outcomes" or "safe harbors," and should resist those commenters who seek self-serving, intrusive, and destructive federal rules. Based on the record, GTE's specific recommendations for acceptable, but not mandatory, outcomes are set forth in the following chart.

PROPOSED ACCEPTABLE OUTCOMES

Good Faith Negotiations	Interconnection	Collocation	Unbundling	Resale	Reciprocal Compensation	Pricing
<p><i>Bona fide</i> request process with specification of requested feature or service, time frame and quantity desired deadlines for ILEC action, assurance of cost recovery.</p> <p>Reasonable non-disclosure agreement to protect confidential cost and technical information of both parties.</p>	<p>Interconnection at end office, tandem, and/or a mutually acceptable meet point.</p> <p>Requests for other points handled through BFR process.</p>	<p>Physical collocation of termination equipment at end office/tandem.</p> <p>Re-adoption of 1992 Expanded Interconnection policies as guidelines.</p> <p>Requests for virtual collocation, other sites for collocation, and/or collocation of other types of equipment handled through BFR process.</p>	<p>Unbundling of local loop, port, transport (per Expanded Interconnection policies), SS7 links, and access to signaling and 800 and LIDB data bases through the STP.</p> <p>Requests for other network elements handled through BFR process.</p> <p>Prohibition on (1) re-combining ILEC-provided unbundled network elements to create the equivalent of a resold ILEC service, and (2) requiring ILEC services to be provided/priced as unbundled network elements.</p>	<p>Avoided costs determined by reference to actual costs incurred, offset by additional cost of wholesaling.</p> <p>Reasonable restrictions permitted to limit resale of below-cost services, promotional offerings, grandfathered services, and cross-category resale; and to protect against stranded investment and disclosure of proprietary technology.</p> <p>Further discounting of discount plans not required.</p>	<p>Non-symmetrical, cost-based compensation rates for transport and termination of non-toll traffic exchanged between ILECs and CLECs or CMRS providers.</p> <p>Option of charging separately for transport and termination.</p> <p>Bill and keep only where voluntarily agreed to by the parties, except a State may impose bill and keep only where it assures mutual recovery of costs through the offsetting of reciprocal obligations.</p>	<p>Pricing of interconnection, unbundled network elements, and collocation based on TSLRIC plus recovery of actual joint and common costs plus a reasonable profit.</p> <p>No "imputation" rule.</p> <p>Concurrent and coordinated rate rebalancing and access reform.</p>

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REPLY COMMENTS

GTE Service Corporation by its attorneys and on behalf of its affiliated domestic telephone operating and wireless companies respectfully submits its reply to the opening comments in this proceeding. As discussed herein the record confirms that the FCC can best implement the local competition provisions of the Telecommunications Act of 1996 (1996 Act) by identifying ranges of acceptable but not mandatory outcomes, while preserving substantial flexibility for negotiating parties and state public utility commissions (PUCs) to develop other reasonable approaches.¹

I. THE FCC CANNOT AND SHOULD NOT PRESCRIBE DETAILED, MANDATORY NATIONWIDE RULES.²

The record presents the FCC with a stark choice. GTE, other incumbent local exchange carriers (ILECs), and leading PUCs and competitive local exchange carriers (CLECs) urge the FCC to provide guidance by identifying ranges of acceptable resolutions, "preferred outcomes," or "safe harbors." AT&T, other IXCs, and some CLECs demand detailed, inflexible federal rules, with the option of supplemental, and even more onerous, state regulations.³ The right choice is clear, and it is not AT&T's approach.

¹ GTE continues to support the positions taken in its opening comments, but will not discuss all of them herein due to page limitations.

² This section responds to Part I.B of the *NPRM*, as well as to other paragraphs, including ¶¶ 47, 50, 57, 61, 63, 67, 73, 79, and 117, that propose adoption of national standards.

³ See AT&T 18 (FCC unbundling rules are a minimum; states should be free to require additional unbundling), 83-85 (states should be free to adopt deeper wholesale discounts than those set using FCC costing methodology).

GTE explained that the 1996 Act does not authorize the FCC to displace state regulation of intrastate services. Rather, in accord with its pro-competitive, deregulatory purpose, the statute confers primary authority for developing acceptable interconnection arrangements in the hands of private parties. To the extent negotiations are unsuccessful, Congress assigned the role of arbitrator and decision-maker to the states, which is not surprising, given the predominantly intrastate nature of the services at issue. The FCC was tasked with adopting rules regarding specific matters such as number portability and administration, and was authorized to review and shape interconnection agreements only if a state failed to act. Its § 251(d) rulemaking authority must accordingly be interpreted and executed consistent with the explicit statutory division of responsibility. GTE 5-7.

GTE's conclusion that §§ 251 and 252 do not radically alter the dual jurisdictional scheme in § 2(b) was echoed by a multitude of parties. The California PUC (CPUC), for example, noted that:

Congress was fully aware of the existence of Section 2(b) when it passed the 1996 Act, and could have made it plain that Sections 251 and 252 clearly grant the Commission jurisdiction over intrastate interconnection, service and network elements. Congress did not do so. CPUC 9, fn. omitted.

And NARUC explained that the House and Senate bills had explicitly amended § 2(b) to exclude the provisions corresponding to §§ 251 and 252, but that it lobbied successfully for the removal of those provisions by the Conference Committee, strongly indicating that a limitation on state authority was not intended. NARUC 10, *citing Russell v. U.S.*, 464 U.S. 16 (1989).⁴

GTE (7-12) also pointed out that mandatory national standards would ignore significant variations among individual states and the substantial work and expertise of state regulators, overwhelm the FCC's enforcement resources, and create a risk that the hastily adopted requirements would be unrealistic and impractical. Notably, Teleport Communications Group (TCG) shared these concerns, cautioning that rules

⁴ A multitude of other parties disputed the analysis underlying the *NPRM's* conclusion that §§ 251 and 252 apply without regard to the jurisdictional limitation in § 2(b). *See, e.g.*, Bell Atlantic 6-7; NASUCA 6-8; New York Department of Public Service (NYDPS) 6-9; Oregon PUC 12-13; Pacific Telesis Group (PTG) 12-13.

leading to a generic, one-size-fits-all interconnection arrangement would make vigorous competition "impossible." TCG 5. A number of state PUCs likewise warned that detailed national rules are untenable, given substantial variations among local markets, ILEC technology deployment, and other factors. *See, e.g.,* Florida PSC 6; NYDPS 18-1.

To avoid the legal and policy pitfalls of detailed national standards, while providing valuable guidance to negotiating parties and states, GTE and a significant cross-section of other parties urged the Commission to identify ranges of outcomes that would be sufficient, but not necessary, to satisfy the § 251 requirements. For example, TCG (5-9) urged the FCC to establish "preferred outcomes,"⁵ the CPUC (17-18) advocated adoption of the preferred outcomes it had developed, and PTG (2-11) recommended that the FCC enunciate "safe harbors" which would include the CPUC's preferred outcomes.⁶

Several commenters, led by AT&T and other IXC's, nonetheless assert that detailed federal rules are not only authorized, but required by the 1996 Act. AT&T's arguments, in particular, are premised on egregious misinterpretations of the statute and judicial precedent. For example, AT&T (4-6) claims that "any Commission regulation that reasonably implements the standards of Section 251 ... will itself preclude the operation of inconsistent state regulations," so that § 2(b) has "no relevance" and is "impliedly repeal[ed]." AT&T similarly argues (4) that the 1996 Act must be read in light of a "settled rule" that federal regulations "will preempt any inconsistent state policies unless the federal statute provides otherwise." These contentions cannot withstand scrutiny.

As an initial matter, § 251 d)(3), on which AT&T primarily relies, is expressly entitled "*Preservation of State Access Regulations*," and it limits, rather than expands, the FCC's authority to promulgate detailed implementation rules. Contrary to AT&T's argument, this provision does not automatically invalidate any

⁵ The major CLEC trade association, ALTS (3), also urged the FCC to adopt rules based on the CPUC's preferred outcomes approach.

⁶ Other parties urging the FCC to identify acceptable outcomes rather than adopting mandatory rules included Bell Atlantic 1-2; Michigan PSC 2-4; NYDPS 3; NYNEX 1; PTG 1-11; SBC 5-8; and USTA 7.

state regulation that varies from the FCC's own. By its plain terms, it gives state rules primary weight by prohibiting the FCC from precluding their enforcement as long as they are consistent with § 251 and do not *substantially prevent* implementation of that section and the purposes of Part II of Title II. Section 251(d) accordingly provides no support for claims that Congress intended to strip the states of their traditional role in regulating intrastate communications.⁷

AT&T's statutory construction argument is equally invalid.⁸ As GTE and several other commenters explained, repeals by implication are strongly disfavored,⁹ particularly with respect to the Communications Act. The Supreme Court, in *Louisiana PSC v. FCC*, 476 U.S. 355 (1986), held that § 2(b) is not just a rule of construction, but a substantive limit on the FCC's power that will apply unless explicitly overridden. As NARUC and others explained, Congress deleted amendments that would have given the FCC authority over local competition notwithstanding § 2(b). The 1996 Act consequently retains the essence of

⁷ Thus, § 251(d) does not invoke the "settled rule" to which AT&T refers. This rule applies, if at all, only when a statute explicitly authorizes a federal agency to preempt state law. In *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159, 162, the Court emphasized that the agency's actions had to be "within its statutory authority"; in that case, preemption by the agency was proper because the legislative history "plainly indicated that the Board need not feel bound by existing state law." The 1996 Act does not give the FCC explicit preemption authority, and in the absence of such authority, the settled rule, as set out in *Louisiana PSC* and a multitude of other cases is that preemption is permitted only when the intrastate and interstate components of the regulated service are inextricably intertwined and state regulation would thwart or impede a valid federal policy. Neither the *NPRM* nor any commenter has demonstrated that the FCC can adopt preemptive rules under this plainly applicable analysis. (The second case cited by AT&T, *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994), is plainly inapposite because it did not involve a conflict between federal and state regulations.)

⁸ Likewise, AT&T (4 and 5 n.3) is wrong in suggesting that courts will automatically give deference to the FCC's regulations under *Chevron Natural Resources Defense Council*, 467 U.S. 837 (1984). Deference under *Chevron* is due only "if the statute is silent or ambiguous with respect to the specific issue," *id.* at 843. AT&T itself should know that *Chevron* deference would not apply in the instant case; at AT&T's urging, the Supreme Court recently held that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear" *MCI Telecommunications Corp. v. FCC*, 114 S. Ct. 2223, 2231 (1994). Here, Congress's intent is clear -- interconnection is to be negotiated by the parties subject to state review and arbitration (if necessary) -- and "that is the end of the matter." *Chevron*, 467 U.S. at 843.

⁹ See, e.g., GTE 4-5, NARUC 11-14.

jurisdictional balance of the 1934 statute, assigning new roles to the FCC and state PUCs consistent with their traditional regulatory responsibilities.

The arguments of other parties that the "specific" terms of §§ 251 and 252 control the "general" terms of § 2(b) must likewise be rejected. *See* MCI 7-8; MFS 6; NCTA 10-11. Sections 251, 252, and 2(b) are all specific, substantive provisions. Moreover, §§ 251 and 252, by their specific terms, allocate primary implementation responsibility to private parties and the states, not the FCC. Accordingly, the conflict among these provisions arises only because of these parties' insupportably broad interpretation of the 1996 Act. Read properly, the 1996 Act gives the FCC authority only to guide private negotiations and state regulators, not to dictate outcomes pertaining to intrastate services.

The proponents of sweeping FCC prescriptions fare no better with their policy arguments. For the most part, these parties merely parrot the unsupported assertions in the *NPRM* that uniform federal rules would improve access to capital and promote more efficient entry. *See, e.g.*, ALTS 3; AT&T 9; CompTel 11-12; MCI 4-5; NCTA 5. They offer no evidence that they intend to pursue the same entry strategies in each market or that they face problems obtaining capital, and such claims would be patently unpersuasive. GTE demonstrated that variations among local markets are so broad as to preclude any "one-size-fits-all" national approach, and, as noted above, several other commenters confirmed the validity of this assertion. Moreover, there can be no serious claim that uniform federal rules regarding local competition would improve the ability of the "new entrants" to access capital. AT&T and MCI are giant corporations, the stock of MFS has enjoyed far better performance than that of GTE or any RBOC, TCG is owned by four of the nation's largest monopoly cable operators, and there is no indication whatsoever that smaller entrants have faced any problems obtaining funding.¹⁰

¹⁰ To the contrary, a recent trade press article entitled "CLECs Enjoy Increased Availability of Capital" reported that "[t]he capital markets have exploded with investors' realization that the new telecom law allows CLECs to compete 'literally anywhere in the United States.'" *Telecommunications Reports*, May 13, 1996, at 37 (quoting Richard Kozak, President and CEO of ACSI).

Nor are these parties correct when they claim that detailed federal rules are needed to expedite competition and minimize litigation. *See, e.g.*, AT&T 7-11; Department of Justice (DOJ) 9. The experience of leading state PUCs has confirmed that such regulatory micro-management would have the opposite effect. As the CPUC cautioned, "[e]xperiences in states that have adopted detailed interconnection rules strongly suggest that too much detail can actually thwart the development of competition." CPUC 18; *see also* Michigan PSC Staff 4; Oregon PUC 25. Under its "preferred outcomes" approach, in contrast, the CPUC noted that "twelve interconnection contracts have been negotiated and approved between five competitors and the two major incumbent LECs," with negotiations taking 30 to 60 days. CPUC 16-18. Accordingly, it is detailed federal rules -- not the acceptable outcomes approach supported by GTE and numerous other parties -- that would overtax the FCC's enforcement resources.

Finally, the state experience, coupled with the firm statutory deadlines for negotiating, arbitrating, and approving agreements, eliminates any concern that ILECs will seek to delay negotiations unless bound by intrusive rules. In this regard, AT&T's claim that GTE has an "overwhelming" incentive to "refuse to accept any arrangement that would permit effective competition" is clearly erroneous.¹¹ In reality, GTE is strongly motivated to negotiate a mutually acceptable and effective agreement, because if it fails to do so, it runs a grave risk that the state PUC will impose far less attractive requirements. GTE must deal with its state regulators on a daily basis, and it has every incentive to be a "good actor" in order to preserve cordial relations. In any event, it is AT&T that seems to have a problem concluding interconnection agreements; GTE already has entered several agreements with other new entrants, including TCG,

¹¹ AT&T also asserts that GTE has "failed to identify the services [it] would allow to be resold." AT&T 7, 8n.6. GTE will fully comply with its statutory resale obligations, and has committed to providing AT&T with a list of resold services. Further, as AT&T is well aware, GTE has filed resale tariffs in Texas, California, and Michigan, and is finalizing avoided cost studies in other states.

Electric Lightwave, Inc. (ELI), Intermedia Communications Inc., MFS,¹² and MCI-Metro, and it is negotiating actively with 36 other parties.¹³

In short, neither the *NPRM* nor any commenter has demonstrated that the FCC can or should prescribe detailed national rules to implement § 251, or that such rules, if adopted, would achieve their intended objectives. In contrast, the acceptable range-of-outcomes approach would advance those objectives by expediting competition, providing helpful guidance, and minimizing litigation. At the same time, this approach would insulate the FCC from legal challenges, accord negotiating parties the flexibility intended by Congress, and respect the expertise and contributions of the state PUCs.¹⁴

II. THE RECORD SUPPORTS ADOPTION OF GTE'S RECOMMENDED RANGES OF OUTCOMES.

A. Good Faith Negotiations (*NPRM* Part II.B.1)

GTE's comments suggested that the FCC presume the parties have acted in good faith when negotiations are handled through a *bona fide* request (BFR) process. As GTE explained, this process should require the initiating party to provide a reasonably detailed description of the services or facilities it is requesting and to advise the ILEC when it intends to commence service using the requested feature.

¹² When asked how he would characterize the progress of negotiations with GTE in Florida, Mr. Timothy T. Devine of MFS stated: "All of our discussions with GTE have gone very well, so I think both parties have been very cooperative, and, you know, we feel that should be able to continue." Florida PSC Docket No. 950984-TP Hearing Transcript at 208-209.

¹³ On March 12, GTE received a request for interconnection from AT&T covering 20 of GTE's 28 states. However, it was not until April 18 that AT&T provided a comprehensive list of 476 "AT&T requirements" to which GTE could respond. Although GTE has spent more time with AT&T than with any other CLEC, GTE is farther apart on reaching agreement on substantive issues due to the extreme nature of AT&T's demands. For example, AT&T "requires" that GTE create and provide customized diagrams of all conduit systems for use by AT&T -- diagrams that are neither needed by nor useful to GTE. Apparently, GTE is not alone in its experiences with AT&T, as shown by the following excerpt from *Communications Daily*, May 23, 1996, at 2:

Ameritech also has been negotiating with other companies, including AT&T, said Neil Cox, Ameritech Pres. - Information Industry Services. "We've spent more time with AT&T than any other competitive LEC and we are more behind with AT&T than with any other," he said.

¹⁴ Attachment 1 hereto proposes language for FCC guidelines identifying acceptable outcomes for each of the substantive requirements of §§ 251(b) and (c)

The ILEC, in turn, would be required to meet established deadlines for requesting any necessary additional information, informing the CLEC of the associated costs or any unresolved technical issues, and beginning to provide the desired service or facility. Several parties proposed similar processes and agreed with GTE that a BFR framework would assure that both parties act reasonably and in good faith. *See, e.g.*, Bell Atlantic 17-20; Nortel 8 (focusing on technical feasibility); PTG 16-21; USTA 14-15.

The opening comments of CLECs and IXC's confirm the need for a BFR process, because they largely overlook the fact that the obligation to negotiate in good faith applies equally to both parties. *See* §§ 251(c)(1), 252(b)(5). For example, several parties claim that ILECs act in bad faith to the extent they (1) do not disclose proprietary technical and cost data, *see, e.g.*, Time Warner Communications (TWComm) 22; American Communications Services, Inc. (ACSI) 8-9, and (2) require CLECs to divulge such data, *see* NCTA 16. However, nothing in the 1996 Act indicates that good faith takes on different meanings when applied to new entrants and ILECs,¹⁵ and the costs of new entrants are expressly relevant in negotiating reciprocal compensation arrangements.

In any event, GTE does not agree that ILECs are required to turn over cost studies during the negotiation process. The parties are free to negotiate an agreement without regard to the requirements of § 251(b) and (c), *see* § 252(a)(1), and the pricing standards in § 252(d) apply only if the agreement has been submitted for arbitration. Accordingly, commenters such as MFS (13) are wrong in asserting that ILECs must provide cost data if their proposed rates are inconsistent with the pricing standards that would apply in the arbitration context.¹⁶

GTE also disagrees with those commenters seeking detailed, national good faith rules. *See, e.g.*, AT&T 87-88; MFS 10-11; TWComm 15-24. As several parties pointed out, good faith is inherently subjective and fact-specific, and therefore is not susceptible to detailed guidelines. *See, e.g.*, Illinois

¹⁵ *See* Texas PUC 6 (any FCC guidelines should apply to all parties to negotiations).

¹⁶ As GTE explained (59-60), GTE disagrees that the FCC has authority to adopt pricing standards, but does believe that appropriate pricing guidelines would be helpful, as discussed in section III, below.

Commerce Commission 20-21; US TA 8. In addition, there is no indication that state commissions are incapable of handling allegations of bad faith or that bad faith negotiations have been a pervasive problem. Federal rules accordingly are unwarranted and likely would be counterproductive.

Finally, GTE is pleased that many new entrants acknowledge the need for and utility of properly structured non-disclosure agreements. *See, e.g.*, ALTS 14; TWComm 23. As Sprint pointed out, use of a non-disclosure agreement need not signal bad faith, because negotiations will concern highly proprietary information. Sprint 11; *see also* Bell Atlantic 48-49. The FCC accordingly should renounce its tentative conclusion (*NPRM* ¶ 47) that non-disclosure agreements evidence bad faith.¹⁷

B. Interconnection (*NPRM* Part II.B.2)

The record reflects widespread agreement that the Commission should not adopt an inflexible standard for technically feasible interconnection, since technology will continue to evolve.¹⁸ *See, e.g.*, ACSI 12; BellSouth 16-17; Cox 42; GTE 18-19; Michigan PSC 8-9. There appears to be similar consensus that interconnection at the end office and/or tandem generally is technically feasible, and that other points of interconnection, such as mutually acceptable meet points, should be the subject of negotiations. *See* Ameritech 13-14; ALTS 18; NCTA 32; PTG 22-23; Sprint 14. GTE accordingly reiterates its recommendation that the Commission identify as acceptable interconnection at the end office, tandem

¹⁷ Some commenters contend that requesting parties must be permitted to disclose proprietary ILEC cost and technical information to regulatory authorities. *See* ACSI 8. This would be totally inappropriate. The ILEC must control disclosure of its proprietary information. If a CLEC wants ILEC information to be disclosed to regulators, the ILEC must have the opportunity to provide it under a protective agreement, along with any relevant explanation or background material in order to assure it is not taken out of context, or made available to parties not involved in negotiations.

¹⁸ As GTE explained (18), "interconnection" refers to the links connecting two networks together. "Transport and termination" encompasses carriage of traffic from the point of interconnection to the end user. This definition was widely accepted. *See, e.g.*, Florida PSC 13; MFS 15; NYNEX 4-5; TWComm 28.

switch, or other mutually agreed-to meet point, with requests for other points dealt with through the BFR process.¹⁹

A number of parties embrace the FCC's tentative conclusion (*NPRM* ¶ 50, 57) that technical feasibility within and between ILEC networks using similar technology may be presumed if an ILEC offers or has offered interconnection at a particular point. *See, e.g.*, ALTS 18-19; CompTel 41; MCI 11; NCTA 33. Although superficially attractive, this presumption is untenable. GTE detailed (18-19) that "similar network technology," such as digital switches, may have widely varying capabilities, depending on the manufacturer, software version, capacity available, and other factors. Several other ILECs echoed this concern, *see, e.g.*, Ameritech 12-13; Bell Atlantic 21; NYNEX 65-66. In addition, ILECs explained that interconnection that was feasible in the past may become obsolete, and that a requirement to continue providing any form of interconnection that was ever offered could freeze technology and create disincentives to the deployment of advanced capabilities. *See* Ameritech 12-13; Bell Atlantic 21; NYNEX 65; SBC 34-36.

Technical feasibility is inherently situation-specific, and not susceptible to simplifying assumptions. Nonetheless, as GTE explained in its opening comments, handling interconnection requests through a BFR process should allow carriers to expedite the technical feasibility determination.²⁰ In particular, GTE (20-21) explained that feasibility will depend on whether interconnection at the requested point would preserve transmission quality and service integrity for each carrier's customers, utilize ILEC equipment and software that is available at the requested point, protect any proprietary information regarding, for example, interface characteristics, and most importantly, maintain network reliability. As AT&T (33) has

¹⁹ MCI (40-41), consistent with its general approach of demanding far more than "pure" CLECs, provides a lengthy list of other points of interconnection, which it asserts are technically feasible. Given the variety of technologies, capacity limitations, physical plant, and standard and non-standard interfaces in ILEC networks today, a general requirement for interconnection at these points would be unrealistic. GTE will address the technical feasibility of a request for interconnection at any point in its network through a BFR process.

acknowledged, feasibility also will be affected by whether interconnection can be achieved in accordance with published industry standards. *See also* Ameritech 15-16.

The record does not support adoption of uniform national rules regarding such matters as installation, maintenance, and repair intervals for interconnection.²¹ As the CPUC noted, "[s]ince interconnection agreements have been approved in several states, and those agreements were determined to be just and reasonable, it is unclear why the FCC needs to develop a single national standard." CPUC 20. The proponents of such a standard (who also generally ask for enforcement penalties) do not acknowledge the substantial variations between urban, suburban, and rural exchanges that would render any national baseline essentially arbitrary. *See* GTE 8-9. Section 251(c)(2) only obligates ILECs to provide installation, maintenance and repair to themselves and interconnecting parties within the same time frames, as at least one CLEC acknowledges. *See* TWComm 30; *see also* SBC 37-38. This standard is self-executing and does not require FCC elaboration. Indeed, as the Florida PSC pointed out, rigid national standards would hamper the development of competition and interfere with the negotiation process. Florida PSC 12.²²

C. Collocation (*NPRM* Part II.B.2.b)

In its opening comments, GTE urged the Commission to identify physical collocation as an acceptable outcome, to state that other forms of collocation may be the subject of negotiations, and to hold that agreements that track the *Expanded Interconnection* rules regarding collocation would evidence compliance with § 251(c)(6). GTE also suggested that the Commission presume that central offices, tandem switches, and remote nodes used as rating points as acceptable premises for collocation and that

²⁰ GTE agrees that ILECs should bear the burden of demonstrating technical infeasibility, assuming that the requesting party has provided sufficient information to permit a reasonable determination.

²¹ Such rules were requested by numerous IXCs and CLECs, including ALTS 19-20; Cox 41-43; MCI 58; and TCG 25.

²² Nor does the statute compel ILECs to offer an electronic interface to their operational support systems, as demanded by AT&T (36-39) and MCI (22-23). GTE discusses this matter in section

vaults generally will not have sufficient space for collocation, and to clarify that "premises" includes only the portion of an ILEC building actually housing network equipment. GTE 23-24.²³

The comments of other ILECs confirm the wisdom of these suggestions. Ameritech (23), for example, noted that ILECs often will face legal and contractual restrictions on their availability to permit third party access to vaults and huts, and PTG (37-38) reiterated the space and security concerns that make collocation at vaults at least inadvisable, and often impractical. Several parties also joined GTE in urging the Commission to interpret the statutory collocation mandate in light of its *Expanded Interconnection* rules regarding such matters as the type of equipment that may be collocated, the premises at which collocation should occur, and the showing required to demonstrate lack of space or security problems. *See, e.g.*, Ameritech 22-23; Bell Atlantic 32-33; NYNEX 66-67; Sprint 21; USTA 19-20.

In contrast, several new entrants ask the FCC radically to expand its collocation rules in several respects:

- they contend that the premises at which collocation must be permitted should include cable vaults, manholes, cross-connect points, loop carrier, building closets, and vaults (AT&T 40; MFS 22);
- they assert that ILECs must provide virtual collocation as well as physical collocation (MCI 56-57; MFS 23-24; TWComm 36-38);
- they state that collocating parties must be permitted to place any type of equipment on ILEC premises, including switches, enhanced service equipment, and customer premise equipment (MFS 24-25; AT&T 40; MCI 54);
- they seek to impose detailed new requirements on ILECs asserting that space or technical considerations preclude physical collocation (AT&T 39-42; MCI 54-56);
- they argue that ILECs may not impose special security arrangements (ALTS 23; MFS 28-29);

II.D.3, below; as explained there, GTE is willing to provide, and in fact does provide, electronic "bonding" to some OSSs today, even though it is not required to do so.

²³ TWComm (35-36) suggests there is a duty to place collocator equipment elsewhere in buildings housing network facilities when space is unavailable in the conditioned portion of the building. In many cases, however, doing so would disrupt ILEC business operations and would require the ILEC to make major building modifications, such as upgrading power supplies, environmental control systems, and security arrangements. A general rule requiring such accommodations is thus inappropriate.

- they maintain that ILECs must permit collocating parties to cross-connect to each other (MCI 54-56); and,
- they claim that the FCC must limit charges for installation, maintenance, repair, and provisioning of collocated facilities to the lowest amount charged by any ILEC (MFS 29-34).

The statute does not authorize the FCC to adopt any of these requirements, and they are unsound policy in any event.

Expansion of "premises." As GTE explained (23-24), the FCC already has properly found that collocation at vaults and huts would raise unacceptable risks to security and be incompatible with the limited space available in such structures. Nothing has changed since the 1992 collocation policies were adopted that would alter this analysis. Moreover, as Sprint points out (20), the definition of "premises" for purposes of § 251(c)(6) must be read in light of the purposes for which collocation can be required under §§ 251(c)(2) and (c)(3). That is, if interconnection at a point is not technically feasible, then collocation certainly cannot be mandated at that point. The FCC cannot presume that any point other than central offices, tandem switches, and remote nodes used for routing purposes, should be deemed a "premises" at which physical collocation must be allowed.

Mandatory virtual collocation. The FCC lacks authority to order ILECs to provide virtual collocation. Section 251(c)(6) provides that virtual collocation is required only if physical collocation cannot be accommodated for space or technical reasons, and the FCC is not free to expand on this requirement.²⁴ See Ameritech 24. GTE nonetheless has long favored virtual collocation, and recommends that the Commission identify virtual collocation as an acceptable outcome when negotiated by the parties.

Collocation of non-termination (transmission) equipment. Requests to expand the range of collocated equipment beyond that "necessary for interconnection or access to unbundled network elements" exceed the requirements of § 251(c)(6) and cannot be granted. Congress simply did not intend

²⁴ Nor can the FCC mandate mid-span collocation arrangements, as requested by TCG (26-30). Such arrangements are plainly not included within the collocation requirement since they do not involve location of equipment at an ILEC's "premises."

that new entrants be permitted to collocate customer premises equipment, enhanced services equipment, switching equipment, or any other type of non-termination-related equipment. Moreover, as the FCC has recognized, requiring collocation of such equipment may accelerate the exhaust of central office space, depriving the ILEC of room to grow and foreclosing collocation by other competitors.²⁵ The FCC accordingly should provide that an acceptable outcome for negotiations would be the collocation of termination equipment, as provided by its 1992 policies.

Demonstration of unavailability. AT&T (39-42) asserts that an ILEC cannot deny collocation unless there is no means of rearranging equipment to make space available or leasing additional space, and contends that if there is not sufficient space, the ILEC must pay for any required trunking. MCI (53-57) claims that an ILEC may not state that space is reserved for its own equipment unless it had a specific plan to deploy equipment before the request for collocation was made. Neither party demonstrates that any such overreaching and intrusive rule is warranted. Under the Commission's 1992 collocation policies, which allowed ILECs to deny physical collocation based on lack of space, a very low percentage of requests for physical collocation were denied. The requested rule must therefore be dismissed as another example of unnecessary and burdensome requirements sought by the IXCs.²⁶

Discontinuance of security arrangements. Under the 1992 collocation policies, ILECs were permitted to utilize reasonable security measures, in recognition of the risks posed by permitting third parties to enter private premises housing highly sensitive equipment. Such security measures, such as partitioned areas for collocating parties and wire cages within the partitioned area for each collocator remain essential to assure that no party has access to any other party's equipment. When multiple parties share central office space, such arrangements are plainly in the best interest of all. Some collocating

²⁵ See *Special Access Expanded Interconnection*, 7 FCC Rcd 7369, 7413-14 (1992).

²⁶ AT&T's request that ILECs give their competitors a free ride to connect to designated equipment elsewhere if space is unavailable is blatantly inconsistent with the § 252(d) pricing standards.

parties may chafe at having to comply with such requirements, but they are necessary to minimize the risk of harm to the public switched telephone network and should not be discontinued.

Cross-connection of collocating parties. Nothing in the statute requires ILECs to cross-connect collocating parties to one another within the central office. The purpose of collocation is to facilitate interconnection by competitors to ILEC networks, not to each other.

Regulation of charges. The 1996 Act does not give the FCC authority to regulate rates for intrastate services, as GTE explained in detail (2-7). Moreover, charges for collocation, as for all services and features provided under § 251, are to be negotiated by the parties instead of established by regulatory fiat, except that state PUCs may impose rates if necessary in the arbitration process. Consequently, the FCC has no authority to grant the rate cap sought by MFS.²⁷

Perhaps recognizing this flaw in its argument, MFS urges that the FCC effectively declare collocation to be jurisdictionally interstate by adopting a "10 percent rule," as was done several years ago for special access circuits. MFS ignores the fact that the FCC also lacks authority unilaterally to impose such a rule even without being constrained by §§ 251 and 252; the 10 percent rule for special access resulted from a Joint Board process.²⁸

In any event, there is no basis for MFS's assertion that provisioning, installation, maintenance, and repair charges should be similar for all ILECs. Costs, particularly for labor, vary substantially from carrier to carrier and location to location.²⁹ Accordingly, it cannot be presumed that the charge imposed by the lowest-priced ILEC would be sufficient to cover the costs and reasonable profit of all other ILECs, as

²⁷ MFS's statement (31) that the incremental costs of collocation should be zero is plainly erroneous. Collocating parties must bear the reasonable costs of floor space, power, and security arrangements; forcing the ILEC to fund these costs would be confiscatory. Similarly, without basis is MCI's claim (53) that ILECs cannot assess non-recurring charges when collocators convert from virtual to physical collocation. Physical collocation requires modifications to the central office, and ILECs are entitled to recover the associated costs.

²⁸ See *MTS and WATS Market Structure*, 4 FCC Rcd 5660 (1989).

²⁹ For example, GTE's charge for engineering and installing an OC3 terminal base module is \$3,634 in Florida, \$4,315 in Texas, \$4,752 in Washington, and \$5,294 in California.

required by § 252(d)(1). MFS's request for rate regulation, like the other requests for detailed and intrusive federal collocation rules, must therefore be denied.

D. Unbundled Network Elements (*NPRM* Part II.B.2.c)

Perhaps the most contentious and difficult policy issues facing the FCC and state regulators as a result of the 1996 Act arise from the § 251(c)(3) unbundling requirement. Read properly, as requiring ILECs to unbundle reasonably defined network elements at technically feasible points for use in the provision of exchange and exchange access services, this provision will help promote fair local competition. Read too broadly, as urged by the IXCs and many CLECs, § 251(c)(3) would deter facilities-based competition, undermine the § 251(c)(4) resale requirement, preclude adequate cost recovery by ILECs, and atomize ILEC networks beyond any reasonable point of utility.

1. The Statutory Framework for Unbundling Is Far More Limited Than Claimed by the IXCs

In its opening comments, GTE explained that the definition of "network element" encompasses only those data bases, signaling systems, and other features and functions that are "used in the transmission, routing, or other provision of a telecommunications service." GTE 25, *quoting* § 3(45). Moreover, once a network element has been properly identified, the duty to make that element available requires (1) that access to the element at a particular point is technically feasible, considering the intended use of the element, and (2) if access is technically feasible, the test set forth in § 251(d)(2) is met. That is, if the element is proprietary, it need not be offered unless "necessary" to the provision of the desired service; if it is not proprietary, then availability is required only if denial of access would "impair" the provision of the desired service. GTE 28-31.³⁰

³⁰ GTE further noted that the statute clearly requires the requesting party to pay all costs associated with unbundling. GTE 31-32. No commenter appears to contend otherwise. *See* Sprint 29; Texas PUC 15. Moreover, as SBC explained (84-86), the unbundling requirement cannot be used to compel an ILEC to create a network element that does not exist at the location desired.

As discussed in the context of interconnection, it is reasonable for the ILEC to bear the burden of demonstrating technical infeasibility, as long as a request provides sufficient detail for analysis. As PTG points out, however, the burden of showing that access to an unbundled network element is either necessary or that its denial would impair the provision of the desired service must rest with the requesting party. PTG 49-51. Accordingly, contrary to the arguments of several IXCs, *see, e.g.*, AT&T 31-33; LDDS 36-38, new entrants cannot simply identify a network element and require its unbundling; the request must be made in the context of a particular desired application (including an indication of actual demand) and must explain why the element meets the relevant § 251(d)(2) standard. The FCC should be hesitant, therefore, to require unbundling of network elements beyond those explicitly referenced in the statute. Any other requests should be dealt with on a case-by-case basis, pursuant to a BFR process.

2. The Statute Prohibits Repackaging ILEC-Provided Unbundled Network Elements into the Equivalent of Resold Retail Services.

The IXCs' true agenda for this proceeding -- evasion of access charges coupled with subsidized entry into the local market -- is nowhere more evident than in their comments on unbundling. Based on egregious misinterpretations of the 1996 Act, they claim that unbundling allows them to replicate ILEC access services without paying access charges, and to avoid paying wholesale rates for resold exchange services by first demanding extreme unbundling and then re-packaging the network elements into retail services, without adding any elements of their own.³¹ *See, e.g.*, AT&T 27-30; LDDS 31-36.

GTE explained that permitting such conduct would undermine the distinction between unbundled elements and resale, deprive ILECs of a compensatory return on resold services, and violate Congress's expectation that unbundled elements would be combined with other elements provided by the requesting party. GTE 26-27, *quoting* Conf. Rpt. at 148. Support for this interpretation came from many other ILECs, *see, e.g.*, NYNEX 29-39; Bell Atlantic 10-14, and, notably, from MFS:

³¹ In section V, below, GTE will refute the IXCs' arguments that they are entitled to interconnection under § 251 in their capacity as IXCs.

the adoption of very distinct pricing methodologies for resale and for unbundled network elements makes it clear that Congress did not intend for subsection (c)(3) to serve as a means for non-facilities-based carriers to obtain at a lower price than is available under subsection (c)(4) service that is *entirely* provided by the incumbent. ... Permitting a non-facilities-based carrier to repackage the ILEC's retail offerings under the cost-based rates provided for unbundled elements would subvert the resale pricing mechanism of the 1996 Act. ... Facilities-based competition would likely be destroyed, in plain contradiction of Congressional intent. ... [The] Joint Explanatory Statement makes it clear that Congress anticipated the unbundling provisions would be used by new entrants to acquire "some," but not "all," of the needed facilities and capabilities from the incumbent, with new entrants furnishing the balance themselves. MFS 37-40 (emphasis in original).

The IXCs assert that re-packaged network elements are different from resale, but their argument is flimsy and their motives are transparent. In general, these carriers contend that resale limits their ability to develop distinctive service and pricing plans. *See, e.g.*, LDDS 31-36. However, as the experience of hundreds of resellers in the long distance market, including LDDS, makes clear, resale enables carriers to add value to an underlying carrier's offerings, develop new pricing plans, and attract revenues that facilitate the transition to becoming facilities-based carriers. These carriers simply want to evade access charges and capitalize on pricing distortions that were mandated to further important social policies, including universal service.

3. The FCC Should Require Unbundled Access to Loops, Ports, Transport, Signaling, and Data Bases Used in Call Routing and Completion.

The comments of GTE and other ILECs make clear that, in general, it is technically feasible to unbundle loops,³² switch ports, and transport elements in accordance with the *Expanded Interconnection* rules, and to provide access to SS7 and the 800 and LIDB data bases through the STP. GTE 24; Ameritech 36-50; NYNEX 60; PTG 51-62; *see also* TWComm 44-45. The record also reflects that

³² MFS (44) urges that ILECs be required to provide five different kinds of loops wherever available or capable of being upgraded. GTE agrees that different kinds of loops can be made available at different locations, but believes that loop characteristics are best left to private negotiations. Given that ILECs are already providing thousands of unbundled loops, there is no apparent need for federal or state rules. GTE does not agree with MFS's demand (44-45) that ILECs must re-assign a customer's loop to a CLEC upon the customer's request with no more than five minutes of disconnect time at no charge. GTE will cooperate in fulfilling such requests. However, there are associated

unbundling of these elements is sufficient to comply with the statute and to facilitate local competition. Bell Atlantic 22; USTA 28-36. Accordingly, the FCC should require unbundled access to these elements and leave consideration of other elements to private negotiations pursuant to a BFR process. In particular, it should resist calls for mandatory sub-loop unbundling, creation of a "local switching platform," provision of dark fiber, access to the AIN, and treatment of OSSs as network elements, as discussed below.

Sub-loop unbundling. As GTE detailed (33-37 & Att. 1), sub-loop unbundling raises complex technical, administrative, and operational issues, and unbundling of a "distribution" element is plainly infeasible. Other ILECs confirmed this conclusion. For example, Bell Atlantic (24) noted that:

no generally accepted industry standard for loop sub-elements exists today, and special hardware and operational systems would have to be designed, developed and deployed to accomplish such unbundling on a meaningful scale. ... Moreover, space in existing facilities where access to such loop sub-elements would have to be provided is extremely limited....³³

USTA (30-31) similarly explained that there is no standard configuration of sub-loop elements, that the technical feasibility of access will depend on the manner in which the loop itself is configured, and that unbundling would require enormous up-front development costs, modifications to outside plant, purchase of additional real estate, and resolution of serious safety, security, and access issues. *See also* Ameritech 37-42; NYNEX 67-69; Sprint 31-42.

Interestingly, the most avid proponents of sub-loop unbundling, AT&T and MCI,³⁴ apparently have conceded elsewhere that it is not necessary for full local competition and that they have no plans to utilize

costs, which must be recovered, and the process may well consume more than five minutes. Once again, procedures for such requests should be worked out by the negotiating parties.

³³ Bell Atlantic also attached declarations from Raymond F. Albers (Att. 3, ¶¶ 18-22) and Dr. Charles L. Jackson (Att. 5) detailing the cost, security, technological, and operational concerns raised by sub-loop unbundling.

³⁴ AT&T mistakenly asserts (Ex. 15) that the Hawaii PUC (HPUC) ordered all 11 elements requested by AT&T (including sub-loop elements) to be unbundled nine months ago. In fact, the HPUC has done no such thing. The order alluded to by AT&T only required that carriers perform cost studies. And just two weeks ago, the HPUC adopted final rules requiring only that: "(a) [u]pon a bona fide request of another carrier, a telecommunications carrier shall: (1) unbundle its network facilities, functions,